

Mullins, Donna

From: Henson, Tucker
Sent: Friday, May 29, 2015 3:03 PM
To: Heffner, Robert A MVN; Nethery, William R MVN
Cc: Mullins, Donna
Subject: RE: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

Rob,

Perhaps a bit of background on the Paco Swain litigation would be beneficial.

EPA fully prosecuted two enforcement actions simultaneously against Mr. Swain, and the judge ruled for EPA (via summary judgment) as to jurisdiction and liability against Mr. Swain in the LPEE case (which included the residential lot discussed below). One week prior to trial, Mr. Swain agreed to settle the penalty portion, but only after considerable pre-trial litigation and subject to unique settlement terms that were very unfavorable to Mr. Swain.

Regarding the AO, the Supreme Court issued the Sackett decision 60 days before this case was filed (and an AO would normally be issued), so the decision to seek an AO on Consent instead of issuing a unilateral AO was deemed necessary. Before the unilateral AO issue was fully analyzed by HQ staff, five years had passed since the initial violation (early 2008), and there was little appetite to use this case as a vehicle to litigate the continuing violation theory or the question of whether the five-year statute of limitations applies to AOs.

Considering this, alongside the fact that any construction in the wetlands areas still requires a permit, I seriously doubt Mr. Swain and the public view this action as implying that "it's worth taking a chance on being penalized."

Thanks,

Tucker Henson
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 6
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-----Original Message-----

From: Heffner, Robert A MVN [mailto:Robert.A.Heffner@usace.army.mil]
Sent: Friday, May 29, 2015 1:27 PM
To: Henson, Tucker; Nethery, William R MVN
Cc: Mullins, Donna
Subject: RE: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Sorry to hear the message being sent to the public is it's worth taking a chance on being penalized for breaking federal law.

Thanks,
Rob

-----Original Message-----

From: Henson, Tucker [mailto:Henson.Tucker@epa.gov]
Sent: Friday, May 29, 2015 12:56 PM
To: Nethery, William R MVN
Cc: Heffner, Robert A MVN; Mullins, Donna
Subject: [EXTERNAL] RE: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

There is not an AO pending. We had originally sought an AO on Consent, but Swain refused. Since its been more than 5 years from the original violation, we decided not to issue a unilateral AO.

-----Original Message-----

From: Nethery, William R MVN [mailto:William.R.Nethery@usace.army.mil]
Sent: Friday, May 29, 2015 12:48 PM
To: Henson, Tucker
Cc: Heffner, Robert A MVN; Mullins, Donna
Subject: RE: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

Hey Tucker, the JD map we provided to Donna is adequate to avoid wetlands. However, it has only been provided to Donna, and we don't have any JD requests from anyone for any portion of the property at this time. Mr. Swain only provided the erroneous report from Mr. Harris and never did request a determination. I'm curious to know if an AO is pending for the existing violations and if we are able to accept ATF applications from individual lot owners.

Thanks, Bill

William R. Nethery
US Army Corps of Engineers, New Orleans District Regulatory Branch, Surveillance and Enforcement Section
(504) 862-1267

-----Original Message-----

From: Henson, Tucker [mailto:Henson.Tucker@epa.gov]
Sent: Friday, May 29, 2015 11:43 AM
To: Mullins, Donna; Nethery, William R MVN
Subject: [EXTERNAL] RE: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

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Donna and Bill,

There isn't an AO or other agreement attached to the property that would inhibit transfer of ownership. Determining whether any potential "problems" with the property is the purchaser's obligation, and my advice is that EPA does not comment on this sort of private transaction.

My understanding is that this is NOT a complete JD (Bill--Is this correct?), and not an agency decision upon which a party could rely to avoid agency enforcement. While we used it in our case, the actual liability was established through Bill's affidavit stating that he observed a surface connection. If potential buyers are concerned, Mr. Swain could request an official JD from the Corps, right?

Tucker Henson
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-----Original Message-----

From: Mullins, Donna
Sent: Friday, May 29, 2015 10:42 AM
To: Henson, Tucker
Subject: FW: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

Tucker,

Is there any problem with Paco Swain selling this property? I think we could give the realtor a copy of the jurisdictional determination from our consultant.?

Donna

-----Original Message-----

From: Heffner, Robert A MVN [mailto:Robert.A.Heffner@usace.army.mil]
Sent: Friday, May 29, 2015 10:36 AM
To: Mullins, Donna
Subject: Emailing: 2008-01954-SQ Swain.pdf (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Donna,

How are you? It has been a long time. I hope this finds you well.

I received a call from a realtor representing a potential buyer of lot 28 in Equestrian Estates. She wanted to know if a jurisdictional determination had been completed. Paco Swain is still associated with the project and was somewhat evasive about answering the realtors questions regarding a JD. Can I provide her with a copy of the map included in the attachment. Are there any resolved issues that prevent Mr. Swain from selling this lot or others at this time?

Thank you for any assistance you can provide.

Rob

Rob Heffner
Chief, Surveillance and Enforcement Section U.S. Army Corps of Engineers, New Orleans District
504-862-1288

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2008-01954-SQ Swain.pdf

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